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No.

In The

Supreme Court of the United States

October Term, 1995

FRANKLIN E. SKEPTON,

Petitioner,

vs.

ROBERT REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the doctrine of vicarious liability extends to individuals in contempt of court proceedings under 18 U.S.C. § 401?

II. Whether the Petitioner, an adult individual, can be found vicariously liable for contempt of court, where: (a) he had no notice of the order of court at issue; and (b) the alleged contemptuous conduct was committed by a third party, who was not found in contempt?

LIST OF PARTIES

Robert Reich, Secretary of Labor, United States Department of Labor.

Franklin E. Skepton, and his successors.

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit.

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Franklin E. Skepton, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 31, 1995.

OPINIONS BELOW

A. The October 31, 1995 judgment order of the Court of Appeals, whose judgment is herein sought to be reviewed, is identified as Case No. 95-1217, is unpublished and is reprinted in the Appendix to this Petition, p. 1a.

B. The February 24, 1995 opinion of the United States District Court for the Eastern District of Pennsylvania, was docketed February 28, 1995, identified as Case No. 95-0932, and is reprinted in the Appendix to this Petition, p. 3a.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on October 31, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same

> offense to be twice put in jeopardy of life or limb; nor shall be compelled at any criminal case to be a witness against themselves, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

18 U.S.C. § 401:

> **A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —**
>
> **(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice; (2) misbehaviour of any of its officers in their official transactions; (3) disobedience or resistance to its lawful writ, process, order, rule, decree or command.**

STATEMENT OF THE CASE

This case arose from an inspection warrant issued by a United States Magistrate Judge on January 13, 1995, pursuant to 29 C.F.R. § 1903.4, following the presentation of a Petition filed by the Secretary of Labor in an *ex parte* proceeding, to inspect a construction project in Bethlehem, Pennsylvania. *See* 18 U.S.C. § 401(3).

The Petitioner, Franklin E. Skepton, is a general contractor, who operates as a sole proprietor. On January 17, 1995, the Secretary arranged for service of the inspection warrant on an employee of the Petitioner, one Paul G. Skepton.

On January 17, 1995, at approximately 8:00 a.m., George R. Boyd, a safety compliance officer for OSHA, appeared at the job site and served an inspection warrant on Paul G. Skepton.

No service was effected upon the Petitioner, Franklin E. Skepton by fax, hand delivery or otherwise, and the Petitioner did

not learn of the existence, issuance and service of the inspection warrant, until *after* the events forming the basis for the contempt petition had already occurred.

Upon receipt of the inspection warrant, Paul G. Skepton informed the OSHA representative that he had to call the company office but was unable to reach the owner of the company, Franklin E. Skepton.

The OSHA safety compliance officer, George R. Boyd, and his assistant, remained on the job site from approximately 7:50 a.m. to approximately 9:20 a.m. During this time period, OSHA personnel walked through the construction site, and their ability to observe work conditions was unrestricted.

There is a dispute as to whether Paul G. Skepton informed Boyd that an inspection was not going to be permitted. The position of Paul G. Skepton is that he had no authority to either authorize an inspection or refuse an inspection, and therefore did not commit himself either way.

Franklin E. Skepton was not at the job site at the time of the visit by George R. Boyd and the representatives of OSHA. Franklin E. Skepton was at home at the time of the visit by the OSHA inspectors and did not learn of the existence of and the service of the inspection warrant at the job site until approximately 3:30 to 3:45 p.m. on the afternoon of January 17, 1995. At no time either on January 17, 1995, or up to the present, has Franklin E. Skepton done anything to prevent any inspections from being conducted by OSHA representatives on the subject job site.

Following the service of the inspection warrant on Paul G. Skepton on the morning of January 17, 1995, the Secretary of Labor thereafter filed a Petition for Adjudication of Civil

Contempt. Instead of naming Paul G. Skepton *and* Franklin E. Skepton as the respondents in the Petition for Contempt, the Secretary named Franklin E. Skepton, *only,* as the respondent.

Paul G. Skepton, the actor who allegedly committed the contemptuous conduct, has to this day never been cited for contempt.

Franklin E. Skepton had no knowledge of either the existence or the service of the inspection warrant until after any alleged violation of the inspection warrant allegedly occurred. He was found to be in contempt of an order of which he had no knowledge.

Franklin E. Skepton did nothing to violate the inspection warrant, including but not limited to, issuing instructions, either express or implied, to any of his employees to violate the inspection warrant. Any violation that may have occurred constituted the unauthorized actions of an employee and not Franklin E. Skepton. Franklin E. Skepton has done nothing to dishonor or refuse the inspection warrant issued in this case.

Following a hearing held before the District Court on February 24, 1995, the court entered an Order finding Franklin E. Skepton in civil contempt. The Order directed Franklin E. Skepton to comply with the inspection warrant, imposed a fine of $4,189.30 and imposed an ongoing obligation to comply with the warrant, upon failure of which there would be a fine of $5,000 per day and the threat of a jail sentence. The Third Circuit affirmed the District Court's judgment.

REASONS FOR GRANTING THE WRIT

I.

THE DOCTRINE OF VICARIOUS LIABILITY SHOULD NOT APPLY TO INDIVIDUALS IN CONTEMPT PROCEEDINGS WHERE: (1) THE ALLEGED CONTEMPTUOUS CONDUCT WAS COMMITTED BY A THIRD PARTY WHO WAS NOT FOUND IN CONTEMPT; AND (2) WHERE THERE IS NO NOTICE OF THE COURT ORDER AT ISSUE.

The doctrine of vicarious liability extends to contempt of court proceedings under 18 U.S.C. § 401 only under certain circumstances.

A Court Order binds parties and those in active concert with parties who have actual notice of the Order. Fed. R. Civ. P. 65(d). A non-party may be held liable for contempt if he either abets or is legally identified with the named defendant, but those not legally identified must have actual knowledge of the Order to be bound. *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988); *N.L.R.B. v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977).

Although an Order to a corporation may bind those who are legally responsible, *N.L.R.B. v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984); *see United States v. Wilson*, 221 U.S. 361, 376, 31 S. Ct. 538, 542-43 (1911), Franklin E. Skepton is a sole proprietor. Therefore, the knowledge of Paul G. Skepton cannot be imputed to the Petitioner. *See Securities and Exchange Commission v. Coffey*, 493 F.2d 1304, 1310 (6th Cir. 1974), *cert. denied*, 420 U.S. 908, 95 S. Ct. 826 (1975); *Backo v. Local 281, United Bhd. of Carpenters and Joiners*, 438 F.2d 176, 180 (2nd Cir. 1970), *cert. denied*, 404 U.S. 858, 92 S. Ct. 110 (1971).

As Judge Learned Hand said in *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930):

> A person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law.

Franklin E. Skepton neither knowingly nor unwittingly assisted Paul Skepton in violating the court's Order. Yet he is named as the defendant in the Contempt Order.

An employer may not be found guilty of contempt for the act of his employee whose act he neither authorized, consented to, nor ratified. *United States v. Taystee Baking Co.*, 55 F. Supp. 490 (D.C. Tex. 1944); *see In Re Public Service Co. of New Hampshire*, 848 F. Supp. 318 (D.R.I. 1994), *aff'd*, 43 F.3d 763 (1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1959 (1995) (pertinent inquiry is whether non-party knowingly played material role); *see also, Roe v. Operation Rescue*, 54 F.3d 133 (3rd Cir. 1995) (where leader of anti-abortion organization solicited support for campaign, acting in concert with the organization); *Hoover v. Wagner*, 47 F.3d 845 (7th Cir. 1995) (requirement of purpose and effect of assisting party).

II(a).

FRANKLIN E. SKEPTON WAS NOT GIVEN NOTICE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In matters of contempt, persons are not held liable unless they know or have notice. Without service of process or knowledge or notice, a violation cannot be made out. *Pettibone v. U.S., Idaho*, 148 U.S. 197, 13 S. Ct. 542 (1893).

A person is liable for civil contempt only if he violates a Court Order with actual notice that the Order has been issued. *Thompson v. Johnson*, 410 F. Supp. (D.C. Pa. 1976), *aff'd*, 566 F.2d 568 (1976); *Farber v. Rizzo*, 363 F. Supp. 386 (D.C. Pa. 1973).

One of the primary elements of due process is notice. *Lieb v. American PAC. International, Inc.*, 489 F. Supp. 960 (D.C. Pa. 1980). The due process clause requires, at a minimum, that the government provide notice and some kind of hearing before deprivation of a property interest. The notice provided must be reasonably certain to inform those affected. *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991). The essence of the due process clause is the requirement that the person in jeopardy of serious loss be given notice of the case against him, and the opportunity to meet it. *Kaczmarczyk v. I.N.S.*, 933 F.2d 588 (7th Cir. 1991).

Franklin E. Skepton, operating as a sole proprietor, cannot be found to have been in contempt of an Order of which he had no knowledge. The record is devoid of any evidence of notice to Franklin E. Skepton of the existence, issuance and service of an inspection warrant. The inspection warrant was served on a non-owner of the company, who although an employee of the company, was not the project manager on this particular construction site. The case law requires proof of actual notice, not implied or constructive notice.

OSHA made no effort to contemporaneously serve Franklin E. Skepton with a copy of the warrant either by personal service, by fax, by mail, by e-mail, by mailgram, by telegram or even through verbal telephone notice of the existence, issuance and service of the warrant. There was no service of the warrant on Skepton's attorney.

Notice is one of the most basic requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution. In this case, these requirements have not been met.

II(b).

FRANKLIN E. SKEPTON HAS HIMSELF DONE NOTHING BY WAY OF ANY ACT OR OMISSION TO VIOLATE OR DISOBEY THE INSPECTION WARRANT.

The record is devoid of any evidence concerning any action or omission by Franklin E. Skepton concerning noncompliance by him as an individual with the subject inspection warrant. As stated above, he did not even know of its existence until after the alleged violation took place. Franklin E. Skepton gave no instructions to his employees regarding compliance with the warrant. If anyone refused the inspection, it was Paul G. Skepton.

Any actions or omissions undertaken by Paul G. Skepton were taken without the knowledge or approval of Franklin E. Skepton, and therefore cannot be attributed to him.

III.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION CANNOT FORCE A CITIZEN TO VERBALLY EXPRESS HIS "CONSENT" TO AN OSHA INSPECTION CONDUCTED PURSUANT TO AN INSPECTION WARRANT.

Matthew J. Reider, Regional Counsel for the Occupational Safety and Health Administration of the United States Department of Labor testified that the only way for a citizen to avoid a contempt petition is to state their assent or agreement to an inspection warrant. The mere protest and/or objection is considered defiance of the court and in violation of 18 U.S.C.

§ 401. This type of action violates the citizen's First Amendment rights and should be prohibited.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1217

ROBERT REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

v.

FRANKLIN E. SKEPTON, and his successors,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 95-cv-00932)
District Judge: Honorable Franklin S. VanAntwerpen

Submitted Under Third Circuit LAR 34.1(a)
Tuesday, October 24, 1995

BEFORE: SLOVITER, *Chief Judge,*
COWEN and GARTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, Franklin E. Skepton and his successors, it is

ADJUDGED AND ORDERED that the judgment of the

Appendix A

district court dated February 24, 1995 and docketed February 28, 1995 be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Sloviter
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

APPENDIX B — BENCH MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 28, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 95-0932

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

BENCH MEMORANDUM

VAN ANTWERPEN, J FEBRUARY 24, 1995

Plaintiff Robert Reich, Secretary of Labor, United States Department of Labor, has filed a written petition for

adjudication of civil contempt pursuant to 18 U.S.C. § 401(3). Defendant Franklin E. Skepton is a sole proprietor who is currently engaged in school construction at the Nitschman Middle School, 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania. We issued a Rule to Show Cause, and after proper notice and service of the Rule, a full court hearing was held on February 24, 1995.

We find the following facts by clear and convincing evidence:

(1) In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21, 98 S. Ct. 1816, 1824-25 (1978), the Supreme Court upheld administrative searches based upon a general administrative plan. On the basis of such a plan, the University of Tennessee scheduled the local Occupational Safety and Health Administration (OSHA) office for a "programed" inspection of defendant's jobsite at the Nitschman Middle School.

(2) Because defendant has a long history of vocal criticism of OSHA policies and practices and has previously resisted safety inspections at his jobsites, the local OSHA office applied for and properly obtained a valid anticipatory inspection warrant from United States Magistrate Judge Arnold Rapoport on January 13, 1995. This warrant conformed to 29 C.F.R. § 1903.4(b). Plaintiff had previously obtained a warrant and served it on Mr. Paul Skepton at the jobsite on January 13, 1995, however, Paul Skepton refused to let the inspectors enter because the warrant referred to the wrong county and because he claimed the warrant was "too broad."

(3) The corrected warrant was served upon defendant's

job foreman, Paul Skepton, on January 17, 1995 at about 8:00 a.m. At that time, Paul Skepton was giving orders on the job, had a key to the construction trailer, had voiced objections to the prior warrant, and was admitted by defendant's testimony to be the foreman on the job. He had apparent authority to receive service of the warrant and was properly served with said warrant.

(4) Notwithstanding proper service of the warrant, Paul Skepton willfully refused to comply with said warrant, and told plaintiff's inspectors that they would not be permitted to conduct an inspection.

(5) The said Paul Skepton is an agent and employee of defendant, and said willful refusal by him is a refusal on the part of the defendant.

(6) The jobsite in question is an active school site, and danger may be present to construction workers and school children.

(7) Because of the willful refusal of his employee to obey lawful process, defendant is in contempt of this court. Since our goal is to compel compliance with lawful process, we will find defendant in civil contempt.

(8) Upon motion of the Government, we will impose a fine of $4,189.00 to be paid within 30 days of February 24, 1995 to make the Government whole for its costs. We will also impose an additional fine of $5,000.00 per day for each day our contempt order is not complied with. Since safety to others is at issue, we will also reserve the option to impose a jail sentence if necessary. This bench memorandum is made a part of our civil contempt order issued this same day.

Appendix B

BY THE COURT

s/ Franklin S. Van Antwerpen
United States District Judge

APPENDIX C — CIVIL CONTEMPT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 95-0932

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

CIVIL CONTEMPT ORDER

AND NOW, this 24th day of February, 1995, it is hereby ORDERED as follows:

Appendix C

1. Neither defendant Franklin E. Skepton nor his agents, employees, or foremen shall in any way unlawfully harass or assault or use force or threat thereof to prevent plaintiff or plaintiff's agents or inspectors from inspecting the jobsite at the Nitschman Middle School, 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania, nor shall said defendant, his agents, employees or foremen refuse admission or state or otherwise inform said plaintiff or plaintiff's agents or inspectors that they may not conduct such lawful inspections.

2. Defendant shall authorize and direct its job foremen, or some other employee in the absence of the foreman, to accept service of warrants of this court and its magistrate judges so that inspections can be conducted, and defendant and his agents, employees, and foremen shall obey and properly respond to and comply with all lawful warrants, subpoenas, and other lawful process of this court and its magistrate judges.

3. Defendant shall inform his agents, employees, and foremen of this order, and shall adopt a policy requiring them to comply fully with this order and all administrative warrants or suffer disciplinary action.

4. So long as defendant pays his fine within 30 days of the date of this order and complies and continues to comply with this order, this court will not impose further sanctions. If defendant's agents, employees, or foremen fail to comply with this order, this court will impose a fine of $5000.00 per day for each day of non-compliance. If defendant Franklin E. Skepton individually violates this order, this court will impose a similar fine or a jail sentence, which jail sentence will terminate upon his personal compliance with this order.

Appendix C

5. Upon request by plaintiff, the United States Marshalls shall assist in enforcing this order and may take such actions as are necessary to do so.

6. Our bench memorandum of February 24, 1995 is incorporated herein, and the findings therein are made a part of this order. This case is closed. Nevertheless, the court will retain jurisdiction over this matter for enforcement purposes.

BY THE COURT

s/ Franklin S. Van Antwerpen
Franklin S. Van Antwerpen
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action

FILE No. 95-932

MAGISTRATE 95-40M

ROBERT REICH, Secretary of Labor, United States Department of Labor,

Complainant,

v.

FRANKLIN E. SKEPTON, and his successors,

Respondent.

In the Matter of

Worksite Inspection of Franklin E. Skepton, a worksite consisting of the construction of an addition and alteration of Nitschman Middle School located at 909 West Union Boulevard, Bethlehem, Lehigh County, Pennsylvania

ORDER

And now this 24th day of February, 1995 upon motion of the Complainant and for good cause shown, a fine of

Appendix D

$4,189.30 is hereby entered against defendants and for plaintiffs, to compensate plaintiffs for the costs incurred for its Petition for Adjudication of Contempt.

s/ Franklin S. Van Antwerpen
Franklin S. Van Antwerpen
UNITED STATES DISTRICT JUDGE

[stamped]
A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: 2/24/95
ATTEST: s/ illegible
DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Supreme Court
FILED
MAR 1996
CLERK

No. 95-1204

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANKLIN E. SKEPTON, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's order holding petitioner in civil contempt based on the knowledge and actions of his employee in refusing to honor a warrant authorizing the Occupational Safety and Health Administration to conduct an inspection of the petitioner's worksite.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1204

FRANKLIN E. SKEPTON, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a), the district court's bench memorandum (Pet. App. 3a-6a), and the district court's civil contempt order (Pet. App. 7a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1995. The petition for a writ of certiorari was filed on January 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the general administrative plan of the Occupational Safety and Health Administration (OSHA) for "programmed" inspections, a safety

inspection was scheduled of the worksite at Nitschman Middle School in Bethlehem, Pennsylvania, where petitioner Franklin E. Skepton, a sole proprietor, was engaged in construction work. Because of petitioner's established history of resisting safety inspections at his jobsites, OSHA had sought and obtained an inspection warrant from United States Magistrate Judge Arnold C. Rapoport, which it served upon petitioner via his employee and job foreman, Paul Skepton (Skepton), at the Middle School jobsite on January 13, 1995. Skepton, however, refused to let the OSHA inspectors enter the jobsite because the warrant referred to the wrong county and because he claimed the warrant was "too broad." That same day, the agency returned the unexecuted warrant to the magistrate judge to correct the error concerning the name of the county, and obtained the warrant at issue in this case. Pet. App. 4a-5a.

At approximately 8:00 a.m. on January 17, 1995, two OSHA inspectors served the corrected warrant upon Paul Skepton, who again "willfully refused to comply with said warrant, and told plaintiff's inspectors that they would not be permitted to conduct an inspection."[1] Pet. App. 5a. After failing to resolve the matter informally, OSHA initiated the underlying petition to hold petitioner in civil contempt, pursuant to 18 U.S.C. 401(3). See Pet. App. 3a-4a.

2. Because Paul Skepton, as foreman, was giving orders on the job, had a key to the construction trail-

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[1] Petitioner asserts that "[t]here is a dispute as to whether Paul G. Skepton informed [the Secretary's inspector] that an inspection was not going to be permitted." Pet. 4. The district court, however, resolved that factual matter against petitioner. Pet. App. 5a. Petitioner does not ask this Court to reverse that factual finding as clearly erroneous.

er, and had voiced objections to the earlier warrant, the district court found that he had apparent authority to receive service of this warrant. The court also found that after being properly served with this warrant, Skepton refused to permit an inspection and thus willfully refused to comply with the warrant. After finding that Skepton was an agent and employee of petitioner, the court concluded that the willful refusal voiced by him constituted a refusal on the part of petitioner. Pet. App. 4a-5a. Noting that it was seeking "to compel compliance with lawful process," the court accordingly held petitioner in civil contempt for the "willful refusal of his employee to obey lawful process." *Id.* at 5a. The district court issued an order forbidding petitioner and his agents, employees, and foremen from preventing or obstructing an OSHA inspection, and ordering petitioner to authorize his job foreman or some other employee to accept service and comply with any lawful warrant issued by the court. Pet. App. 8a. The court awarded OSHA $4,189 to make it whole for the costs incurred in attempting to execute the warrant, and prescribed "an additional fine of $5,000.00 per day for each day [its] contempt order is not complied with." *Id.* at 5a, 8a. Nothing in the record indicates that petitioner incurred any fine (beyond the initial assessment of $4,189 to compensate the government for its costs) by not complying with the district court's order.

3. The court of appeals affirmed by judgment order. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or

any other court of appeals. Accordingly, further review is unwarranted.

1. The Occupational Safety and Health Act of 1970 (OSH Act) authorizes the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act. See 29 U.S.C. 657(a).[2] The Secretary conducts two types of inspections under the OSH Act—inspections initiated based on specific evidence of a violation, and inspections made pursuant to a general enforcement plan. He must, however, obtain a warrant before he may conduct a nonconsensual inspection. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). In the present case, the application for the warrant was based on a general administrative plan, Pet. App. 4a, and petitioner does not here challenge that plan or the propriety of the warrant's issuance under it. Because the warrant admittedly was valid, the district court properly held petitioner in contempt and imposed a fine of $4,189 in

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[2] Section 657(a) states:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

government costs after his agent and employee refused to honor the warrant.

2. Petitioner argues that "a non-party may be held liable for contempt if he either abets or is legally identified with the named defendant, but those not legally identified must have actual knowledge of the Order to be bound." Pet. 6. That principle, however, has no applicability here, since the district court held the party (petitioner), rather than the non-party (Paul Skepton), in contempt.[3] Petitioner argues that the district court improperly invoked a "doctrine of vicarious liability" (*ibid.*) to hold him in contempt "for the act of his employee whose act he neither authorized, consented to, nor ratified." Pet. 7. The district court, however, properly relied on evidence showing that Paul Skepton, as job foreman, was in charge of the jobsite on the day in question, to conclude that Paul Skepton had apparent authority to accept service of the warrant and to allow the inspection on behalf of petitioner. Pet. App. 5a. Indeed, petitioner does not directly challenge that finding (which would not in any event warrant review by this Court) or dispute that ordinary principles of agency apply in this regard.[4] See Anthony Aldridge

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[3] Petitioner errs in relying (Pet. 7) on *In re Public Service Co.*, 848 F. Supp. 318 (D.R.I.), aff'd, 43 F.3d 763 (1st Cir. 1994), cert. denied, 115 S. Ct. 1959 (1995). That case involved a non-party held liable for contempt.

[4] Petitioner does assert that "[a] person is liable for civil contempt *only* if he violates a Court Order with actual notice that the Order has been issued." Pet. 8 (emphasis added). But the case upon which he relies for that proposition actually frames it as a sufficient condition, not a necessary one: "A person is liable for civil contempt *if* he violates a court order with actual notice that the order has been issued." *Thompson*

& David Eady, *The Law of Contempt* 268-269 (1982). In particular, "the principles of agency law dictate that, as between a principal and a third party dealing with an agent of that principal, a third party should and must be able to rely upon the acts of the agent which are performed with either actual *or apparent* authority." *In re Fowler*, 16 B.R. 596, 597 (Bankr. S.D. Ohio 1981) (emphasis added) (holding principal who lacked actual notice guilty of contempt where agent had notice of pendency of bankruptcy proceeding).

3. Petitioner also appears to suggest that the district court violated due process by holding him in contempt "of an Order of which he had no knowledge." Pet. 8. That issue, however, is not before the Court. The questions presented for review mention no constitutional claim. See Pet. i. Moreover, petitioner

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v. *Johnson*, 410 F. Supp. 633, 640 (E.D. Pa.) (emphasis added), aff'd, 566 F.2d 568 (3d Cir. 1976) (Table). Because the putative contemnors in *Thompson* did all have knowledge of the court order, see 410 F. Supp. at 640, that case could not establish the negative proposition espoused by petitioner.

Similarly, petitioner's reliance (Pet. 7) on *United States* v. *Taystee Baking Co.*, 55 F. Supp. 490 (N.D. Tex. 1944), is misplaced. "That case is distinguishable since the United States there was seeking an injunction, not contempt for the violation of a prior [court order]." *Singer Mfg. Co.* v. *Sun Vacuum Stores, Inc.*, 192 F. Supp. 738, 742 (D.N.J. 1961). Although "in dictum the [*Taystee Baking*] [c]ourt seemed to indicate that a corporation should not be held in contempt as a matter of discretion in seeking an equitable result where the corporation issues orders for compliance, but its employees violate such orders," *ibid.*, even then the *Taystee Baking* court claimed only to be enunciating "[a]n equitable rule," 55 F. Supp. at 494, not a constitutional or other unyielding limit on the power of a district court to issue a civil contempt citation.

raised no due process challenge to the contempt proceedings in the district court, see C.A. App. 214-215 (answer to petition for adjudication of civil contempt), 216-217 (memorandum in opposition to petition for adjudication of contempt), 233-235 (answer to motion for assessment of compensatory fine), 1-129 (transcript of hearing on contempt motion), and he did not argue to the court of appeals that he had been denied due process of law, see Pet. C.A. Br. iv (statement of issues presented for review), 9-10 (summary of argument).[5]

In any event, there is no merit to petitioner's suggestion that the district court's contempt sanction violated due process. The case law requiring actual notice ensures that contempt will not lie where the contumacious activity was performed unknowingly, that is, without knowledge of the court order it violates. Here, Paul Skepton was served with the inspection warrant and knew full well that he was disregarding the district court's order by telling the

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[5] Petitioner alluded to constitutional due process requirements in but one sentence in his court of appeals brief. See Pet. C.A. Br. 13-14. That passing reference, which did not even cite any precedent, is insufficient to have raised a constitutional argument. See, *e.g.*, *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal."); *id.* at 182 ("[T]o assure consideration of an issue by the court, the appellant must both raise it in [the] Statement of the Issues and pursue it in the Argument section of the brief."), quoting 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3974, at 421 (1977 and Supp. 1993, at 690); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1165 n.8 (3d Cir.) ("Manna's mere mention of an analogy between [two legal provisions] is insufficient to raise this issue on appeal."), cert. denied, 116 S. Ct. 477 (1995).

OSHA inspector not to inspect the worksite. Prior to entering its contempt order, the district court afforded petitioner "notice and some kind of hearing" (Pet. 8), at which petitioner contested whether Paul Skepton, his employee and agent, had actually refused to comply with the inspection warrant. The court resolved that issue against petitioner, consistent with the dictates of due process, and petitioner was properly held liable on general agency principles for his agent's knowing violation of the court's order. *In re Fowler*, 16 B.R. at 597-598;[6] cf. *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 293 (5th Cir. 1971) ("Since * * * the Company, *through its agent* Baxter, has violated * * * this Court's earlier order, we have no choice but to adjudge the Company in civil contempt.") (emphasis added). That fact-bound determination raises no issue of general importance for this Court to resolve.

There likewise was nothing objectionable or extraordinary about the court's choice of sanction. The district court's order did not threaten petitioner's liberty. The only funds that it required petitioner to pay for the past refusal to comply with the warrant merely compensated the government for the costs it had incurred as a result of petitioner's agent's violation. Cf. *Farber* v. *Rizzo*, 363 F. Supp. 386, 394-395 (E.D. Pa. 1971) ("Civil contempt is intended to enforce compliance with a court order or to com-

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[6] The court awarded no damages in *Fowler* because there was no record evidence of any damages caused by the contumacious conduct. 16 B.R. at 598. Here, however, respondent detailed the costs imposed by petitioner's refusal to comply with the inspection warrant. See C.A. App. 220-232 (government's motion for assessment of compensatory fine with supporting declarations).

pensate for losses or damages sustained because of a violation of the order.").

4. Finally, there is also no merit to petitioner's suggestion (Pet. 9-10) of a First Amendment violation assertedly flowing from his being held in contempt for not verbally consenting to, but instead objecting to, the inspection warrant. The district court held petitioner in contempt not because of his views, but instead based on petitioner's actions and those of Paul Skepton, his agent and employee. The notion that either OSHA or the court violated petitioner's First Amendment rights by requiring him to comply with an inspection warrant is baseless. Indeed, the petition does not include a First Amendment issue in the questions presented for review, see Pet. i, and petitioner does not cite any authority supporting his view that he is illegally being forced "to verbally express his 'consent' to an OSHA inspection." Pet. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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